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MAY 29 1984
ALEXANDER L. STEVAS
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No. 83-1540

In The Supreme Court of the United States
October Term, 1983

ELMER LESTER, et al., Appellants

v.

EARL F. McGILL, Appellee.

On Appeal from the Supreme Court of Idaho

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS APPEAL OR TO AFFIRM JUDGMENT BELOW

COMES NOW the Appellee, by and through his counsel of record, and pursuant to 28 U.S.C. § 1257 and Rule 16.1 of the Rules of this Court, moves this Court to dismiss this appeal or to affirm the judgment below for the following reasons:

1. This appeal is not within this Court's direct appeal jurisdiction under 28 U.S.C. § 1257(1) and (2).

2. This appeal does not present a substantial federal question and the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on at the appropriate level of procedure required by the law and rules of the State of Idaho governing the question.

3. There is, at this time, no final judgment of the highest Court of the State of Idaho from which an appeal can be taken.

4. The question here presented is so unsubstantial as to require neither further briefing nor argument in this Court.

5. In the event this Court should deem the Notice of Appeal and the Jurisdictional Statement in this appeal as a petition for a writ of certiorari, the petition for writ of certiorari should be denied for the reasons stated above and further explained below.

The bases for this Motion are more specifically described below.

I.

THIS PURPORTED APPEAL FROM THE ORDER OF THE IDAHO COURT OF APPEALS IS OUTSIDE THE JURISDICTION OF THIS COURT FOR DIRECT APPEALS FROM FINAL JUDGMENTS OR DECREES RENDERED BY THE HIGHEST COURT OF A STATE UNDER 28 U.S.C. § 1257.

As the Jurisdictional Statement makes clear, Appellants are not raising the propriety of a state court judgment or decree (1) where the validity of a treaty or statute of the United States is drawn in question and the decision is against its validity or (2) in which the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States is drawn in question and the decision is in favor of its validity. Under 28 U.S.C. § 1257, those are the two jurisdictional bases for a direct appeal to this Court from a decision of the highest Court of the State of Idaho. Instead, this appeal raises questions concerning the propriety of procedure in the Idaho Courts as that procedure may have affected the rights, privileges or immunities claimed under the United States Constitution by Appellants. Under 28 U.S.C. § 1257, review of final decrees or judgments of state courts where the question presented is of this nature, must be had only by writ of certiorari, if at all. 28 U.S.C. § 1257(3).

As the Jurisdictional Statement makes clear, the Appellants are urging that an incorrect application of statutes and rules of the State of Idaho have caused them to be denied due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. They are not asserting that the Idaho statutes and rules are themselves invalid under the

Constitution of the United States. Under the plain language of 28 U.S.C. § 1257, the only vehicle for review of the questions presented by these Appellants is writ of certiorari.

II.

NO SUBSTANTIAL FEDERAL QUESTION IS SOUGHT TO BE REVIEWED IN THIS APPEAL.

The factual matters relevant to this appeal are, in essence, set forth in the Opinion of the Court of Appeals of the State of Idaho which is found at Pages 45a through 55a of Appendix A of Appellants' Jurisdictional Statement. That Opinion, together with the Order which it supports found at Pages 42a through 44a of that Appendix were denied further review by the Court of Appeals, an intermediate appellate court in the Idaho court system (Order found at Pages 56a through 57a in that Appendix.) Indeed, that is the only record upon which Appellants rely for their assertion of appellate jurisdiction in this Court. In the opinion of the Court of Appeals, that Court states that the issue presented to it was whether under either state or federal constitutional or state statutory provisions of the Appellants were denied due process of law because of the assignment of the trial in this case to an Idaho attorney-magistrate. The Idaho Court of Appeals determined that issue adversely to Appellants on both the state and federal grounds. The issue of the federal constitutional right to trial by a state district judge as opposed to an appointed state attorney-magistrate sitting as a state district judge is the issue which has been sought to be reserved for review by this Court in this appeal.

Briefly stated, the facts, as they are set out in the Opinion of the Idaho Court of Appeals, are these. While this case was awaiting trial in the State of Idaho District Court, the Administrative Judge for the district in which it was pending requested that the Supreme Court assign an attorney-magistrate of that district to try the case. No party objected to that request nor did any party object to the Idaho Supreme Court's Order appointing the attorney-magistrate when entered. Finally, no party objected when the appointed attorney-magistrate proceeded to try the case and render his decision.

Thereafter, following entry of judgment and the filing of an appeal to the Idaho Supreme Court, and while that appeal was pending, the Appellants moved for the first time for an order declaring that the appointment of the attorney-magistrate to sit as district judge in this case was improper and that, therefore, the trial judge lacked "subject matter jurisdiction." Originally that motion was directed to the Idaho Supreme Court and then it was renewed by petition to the Idaho Court of Appeals. The Idaho Court of Appeals examined both the federal and state law questions raised by the Appellants. In the portion of its Order and Opinion, which may be found at Pages 51a through 55a of Appellants' Appendix to their Jurisdictional Statement, the Court carefully reviewed the Idaho State constitutional law, statutory law, and the Idaho Rules of Civil Procedure and determined, as a matter of state law and state statutory construction that there was no substantial defect in the appointment of an attorney-magistrate to sit as a district judge in this case. The Idaho Court further held that, in any event, under the applicable provisions of the Idaho Code and the Idaho Rules of Civil

Procedure, Idaho Code § 1-2214 and Idaho Rule of Civil Procedure 82(c)(3), the failure to raise by objection the propriety of an assignment to a magistrate waived any defect in that appointment and no judgment entered in the absence of timely objection was subject to being overturned by virtue of a possibly improper assignment. This is, fundamentally, a determination of the applicable Idaho State constitutional and statutory law in this instance by a competent Idaho court.

As this Court held in *Akins v. Texas*, 325 U.S. 398 (1945), this Court will leave to the states to determine their own questions of the administration of their judicial systems unless significant due process defects inhere in that system. As this Court stated in the *Akins* case at footnote 1, page 399:

> Whether the state rule is expressed in constitution, statute or decision, or partly in one and partly in another, the state's power is to be viewed as a totality. In the absence of a violation of [a] fundamental principle of justice, a state's determination is conclusive upon the federal courts as to the meaning of the state law, so far as any federal question is concerned. [Citations omitted.]

The Idaho Court of Appeals, in its opinion, could find no failure of a "fundamental principle of justice" in the assignment and procedure in this case. (Appendix to Jurisdictional Statement at 50a.) It is the propriety of that Court's having so determined which is the sole issue presented to this Court on this appeal.

Appellants have brought no record to this Court which would establish any fundamental failure of the essential elements of due process of law. There is no showing of a failure of notice, of adequate preparation, of trial before a competent judge, of hearing, of right of cross-examination and confrontation, of appellate

review, or any other fundamental premise upon which procedural due process is based. All that Appellants point to in this case is an assertion that an "inferior" judge was sitting in the place of a "superior" judge, a question which is one of local state law and not one of constitutional moment. Indeed, an examination of the careful, lengthy, and detailed "Findings of Fact, Conclusions of Law and Order" entered by the trial judge at the conclusion of trial in this matter (Appendix to Jurisdictional Statement at 5a-35a) reveals that Judge Drescher, an attorney-magistrate sitting as a District Judge, deliberated carefully upon the evidence presented to him at the trial. There is no other record which would rebut the presumption that this case proceeded in an orderly way with the full panoply of rights accorded litigants in the courts of Idaho.

As the Idaho Appellate Court correctly points out in its Opinion, attorney-magistrates are judges within the Idaho judicial system. Under Idaho Code § 1-2206 they must meet a series of qualifications including being 30 years of age, licensed to practice within the State of Idaho, and five years admission to practice for at least five years prior to appointment as a magistrate. Thus the *ipse dixit* of Appellants that an attorney-magistrate in Idaho is, somehow, an "inferior" judge so as to create a question of due process having constitutional dignity before this Court is not supported either in the laws of the State of Idaho or in the record which is appended to their Jurisdictional Statement.

Before this Court will undertake review of alleged procedural failures in a state court's system it has consistently required that the constitutional question raised be substantial. Where it appears that the con-

stitutional question presented is not and was not substantial in character, this Court has consistently declined to note jurisdiction and a litigant does not have a right to review by this Court on such a question. *E.g., Bailey v. Anderson*, 326 U.S. 203 (1945); *Zucht v. King*, 260 U.S. 174 (1922) (Brandeis, J.). That well-established rule is similarly reflected in Parts (b) and (c) of Rule 16.1 of the Rules of the Court. Because there is no record showing a failure of the fundamental principles of justice as is required by *Akins v. Texas*, *supra*, and because the matter has been essentially one of the applicability and the correct interpretation of state law, jurisdiction should be denied. If this Court should treat the Jurisdictional Statement as a petition for certiorari, certiorari should be denied.

The authorities cited by Appellants in their Jurisdictional Statement tend to go to questions of an interpretation of Idaho procedural law. If they are complaining that the Order of the Appellate Court below changed the law announced in *White v. Marty*, 97 Idaho 85, 540 P.2d 270 (1975), that is purely a question of state procedure and not one which rises to the dignity of an issue for this Court. *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924).

III.

THE FEDERAL QUESTION SOUGHT TO BE REVIEWED IN THIS APPEAL WAS NOT TIMELY NOR PROPERLY RAISED NOR PASSED ON BY THE HIGHEST COURT IN THE STATE OF IDAHO

Idaho Code § 1-2214 requires that the question of assignments of magistrates to cases must be raised by objection before the trial of the action begins and that "no order or judgment is void or subject to collateral

attack merely because rendered pursuant to improper assignment to a magistrate." That same requirement of prior objection is required by Idaho Rule of Civil Procedure 82(c)(3). The issue was first raised in and finally determined by the Idaho Court of Appeals, an intermediate appellate court. It has previously been raised in the Supreme Court, but that Court's decision (Appendix to Jurisdictional Statement at 38a-39a) preceded the case's assignment to the intermediate appellate court. No subsequent review by the Idaho Supreme Court has been had on the issue presented to this Court for its review. Indeed, at the present time, the entire subject matter of the appeal in this case is still pending in the appellate courts in Idaho.

It has long been the rule, which is incorporated in Rule 16.1(b) of the Rules of this Court, that a federal question sought to be reviewed must be timely and properly raised and expressly passed on below before this Court will have jurisdiction over an appeal from a state court. *See, e.g., Beck v. Washington*, 369 U.S. 541, 549-52 (1962); *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649 (1942); *Bailey v. Anderson*, 326 U.S. 203 (1945).

The Idaho statute and rule of procedure clearly required that objection be made before trial in this instance. As the Order of the Idaho Court of Appeals makes clear, no such objection occurred until after the appeal in the state courts had been filed. Thus, in this case, the federal question raised for review in this Court was neither timely nor properly raised in the courts in the State of Idaho.

CONCLUSION

The essence of the argument set forth above is simply that the issue raised here is so insubstantial as not

to rise to the dignity of this Court's appellate jurisdiction. Much of what is argued relates to questions of Idaho state law, questions which have been firmly decided in this case by a competent Idaho State Court. There has been no showing of specific abuses of due process, only that Idaho's system for appointing judges as it was exercised in this case properly fit Idaho jurisdictional statutes, a question fully decided by the Idaho State Court. That issue is for the Idaho Court to decide. No fundamental principle of justice has been offended here. Indeed, no objection was raised at an appropriate time under Idaho law so as to allow any cure of technical defect which might have occurred. No question has been raised of any statute of the State of Idaho's being repugnant to the Constitution, treaties or laws of the United States. All that is being complained of is a question of technical Idaho procedural law which has been determined appropriately in Idaho.

For all of these reasons we ask that the appeal in this case be dismissed or the Judgment and Order below be affirmed and, if this Court should treat the Jurisdictional Statement in this case as a petition for certiorari, that certiorari be denied.

RESPECTFULLY SUBMITTED this 25th day of May, 1984.

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APPENDIX

Idaho Code § 1-2206:

1-2206. Magistrates — Qualifications — Institute — Exceptions — Office appointive. — (1) A magistrate shall be a qualified elector of the county for which he is appointed and shall reside there so long as he serves as magistrate, except that qualified nonresidents may be appointed as magistrates when no qualified resident elector is available.

(2) No person shall be eligible for appointment to the office of magistrate unless he is a graduate of a high school or has attained the equivalent of a high school education as indicated by the possession of a certificate of equivalency issued by the state department of education based upon the record made on the general education development test.

(3) Magistrates shall not take office for the first time as magistrates until they have attended an institute on the duties and functioning of the magistrate's office to be held under the supervision of the Supreme Court, unless such attendance is waived by the Supreme Court. All magistrates shall be entitled to their actual and necessary expenses while attending institutes. The Supreme Court will establish the institute to which this subsection refers and will provide that the institute be held every two (2) years between the time of the general election and December 31 of that year, and the Supreme Court may establish an institute at such other times and for such other purposes as it deems necessary and may require the attendance of magistrates.

(4) Notwithstanding the provisions of subsection 2 of this section, all probate judges, justices of the peace and police judges holding office after the second Monday of January, 1969, shall be eligible, upon resignation or upon the expiration of their terms, for the appointive office of magistrate.

Idaho Code § 1-2214:

1-2214. Objections to assignment — Waiver. —All objections to the propriety of an assignment to a magistrate are waived unless made before the trial or hearing begins. No order or judgment is void or subject to collaterial [collateral] attack merely because rendered pursuant to improper assignment to a magistrate.

Idaho Rules of Civil Procedure, Rule 82(c)(3):

Rule 82(c)(3). Objection to assignment to magistrates. — Any irregularity in the method or scope of assignment of a civil action or proceeding to any magistrate under this rule 82, and sections 1-2208 and 1-2210, Idaho Code, and all objections to the propriety of an assignment to a magistrate are waived unless objection is made before the trial or hearing begins. No order or judgment is void or subject to collateral attack merely because rendered pursuant to an improper assignment to a magistrate.